Filed 11/16/12 In re A.V. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.V., a Person Coming Under the Juvenile Court Law.	B236368 (Los Angeles County Super. Ct. No. FJ46059)
THE PEOPLE, Plaintiff and Respondent, v. A.V., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Cynthia Loo, Juvenile Court Referee. Modified and affirmed.

Courtney M. Selan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

A.V., a minor, appeals from an order continuing him as a ward of the juvenile court pursuant to Welfare and Institutions Code section 602[1] by reason of his having committed vandalism causing damage of $400 or more (Pen. Code, § 594, subd. (a)), a wobbler offense alleged as a felony. The juvenile court placed appellant in a camp community placement program. It declared the maximum term of confinement to be three years eight months[2] and awarded appellant 40 days of custody credits. Appellant contends that (1) there is insufficient evidence to support the true finding on the vandalism allegation, (2) the matter must be remanded to the juvenile court for a finding pursuant to *Manzy W.*,[3] and (3) the matter must be remanded for an award of additional earned, but unawarded, custody credits.

We correct the custody credits, remand to the juvenile court to make the *Manzy W.* declaration, and otherwise affirm the order appealed from.

FACTUAL BACKGROUND

On May 26, 2011, near 2:00 a.m., Officer Cesar Aranda and his partner, Officer Guerrero, were driving in their patrol car in the vicinity of 1775 West Jefferson Boulevard, in Los Angeles (1775 Jefferson). At that location, Officer Aranda saw appellant and another individual standing next to each other, facing the business located there. Only one of the individuals held an object that looked like a spray paint can that he was using to spray paint the exterior of the business. Officer Aranda was uncertain what

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 Though not articulated by the juvenile court, the maximum term of confinement appears to have been calculated as follows: a three-year maximum term for either a prior section 602 petition filed against appellant on September 22, 2009 (prior petition), alleging that he committed the offense of receiving stolen property (Pen. Code § 496, subd. (a)), or for the vandalism offense in the petition that is the subject of this appeal, plus one-third the midterm, or eight months, for the other petition.

3 *In re Manzy W.* (1997) 14 Cal.4th 1199 (*Manzy W.*).

the other individual was doing and could not tell if appellant was the person holding the spray paint can.

As Officers Aranda and Guerrero drove towards the two individuals, the individuals saw them and fled. The officers got out of their patrol car and gave chase. They were able to apprehend only appellant, a half block from the vandalized business. The other suspect jumped a fence eight to 10 feet from where appellant was apprehended and escaped. Officer Guerrero conducted a patdown search of appellant and found a red marker in his pants pocket. When Officer Aranda searched the immediate area, he found a red spray paint can lying approximately 10 feet from where appellant was caught.

Officer Aranda returned to 1775 Jefferson and noticed red spray paint on two sliding security gates. The paint smelled and felt fresh. The color of the red on the gates matched the color red found in the spray paint can. The owner of 1775 Jefferson stated that there was no graffiti on the gates when she closed the business the previous evening, and she had not given anyone permission to paint her property.

Jerry Valido (Valido) was the Graffiti Abatement Coordinator and Court Liaison with the City of Los Angeles Department of Public Works, Office of Community Beautification. As part of his job, he handled records when there was graffiti removal work done by and for the City of Los Angeles, including creating and handling invoices. He testified that, "The $475 cost is the flat rate fee that is charge[d] for any private property. The graffiti could be an inch long. It could be 10 feet long. It will still be 475." Valido expounded on this point later in his testimony, stating that since July 2010, the city charged "$475 per roll down door because it is a private property."

DISCUSSION

I. Sufficiency of the evidence

A. Contention

Appellant contends that there is insufficient evidence to support the juvenile court's finding that he committed vandalism causing $400 or more of damage. He argues that there was no evidence that he (1) was the individual who spray painted the property, (2) aided and abetted in spray painting the property, and (3) caused damages in excess of

$400. Appellant argues that the police officers could not identify which of the two individuals was spray painting the property or what appellant was doing at the scene of the vandalism, other than merely being present. He also argues that there was insufficient evidence to support the finding that there was $400 or more of damages caused by the vandalism because the city documents introduced to show the amount of the damages stated that the repairs were for 1771 West Jefferson Boulevard, not 1775 Jefferson, were hearsay and not within the business records exception, and their admission violated the confrontation clause principles enunciated in *Crawford*.[4] This contention lacks merit.

B. Standard of review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) The same principles apply with respect to juvenile proceedings under section 602. (*In re Jesse L.* (1990) 221 Cal.App.3d 161, 165.)

C. Elements of vandalism over $400

Penal Code section 594 provides that every person who maliciously defaces with graffiti, or damages or destroys any real or personal property not his or her own is guilty of vandalism. (*In re Nicholas Y.* (2000) 85 Cal.App.4th 941, 943; *In re Leanna W.* (2004) 120 Cal.App.4th 735, 743.)

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4 *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

There was insufficient evidence that appellant directly defaced 1775 Jefferson. The only evidence on that point was that appellant was one of two males facing the vandalized property, only one of whom was seen spray painting it. Officer Aranda was unable to say whether it was appellant or the other male who did the spray painting. Thus, there was no evidence that appellant was the direct perpetrator. Consequently, if he has culpability for vandalism, it can only be based on an aiding and abetting theory.

D. Aiding and abetting

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (Pen. Code, § 31.) A person is liable for aiding and abetting when, (1) with knowledge of the unlawful purpose of the perpetrator and (2) with the intent or purpose of committing, or encouraging, or facilitating the commission of the crime, that person (3) by act or advice aids, promotes, encourages, or instigates the commission of the crime. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 386.) The test of whether a person aided or abetted in the commission of an offense is "whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures." (*People v. Villa* (1957) 156 Cal.App.2d 128, 134.) It is not necessary that the primary actor expressly communicates his criminal purpose to the defendant, as that purpose may be apparent from the circumstances. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531–532.)

But mere presence at the scene of the crime and failure to take steps to prevent it cannot alone establish one as an aider and abettor. (*People v. Luna* (1956) 140 Cal.App.2d 662, 664.) It is merely one circumstance "which will tend to support a finding that an accused was a principal" that is to be considered along with the accused's companionship and conduct before and after the offense. (*People v. Laster* (1971) 18 Cal.App.3d 381, 388; see also *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.) Whether a person has aided and abetted in the commission of a crime is ordinarily a question of fact for the trier of fact. (*People v. Herrera* (1970) 6 Cal.App.3d 846, 852.)

There is ample circumstantial evidence that appellant aided and abetted the vandalism. He was found in the middle of the night at the scene of the offense standing right next to the other suspect, facing the building that was being defaced. Under these circumstances, the perpetrator's unlawful purpose would have been readily apparent. The circumstances also support a compelling inference that appellant was not simply an innocent passer-by at that hour, but a participant in the crime. When appellant saw the police officers, he and the other suspect fled, reflecting a consciousness of guilt. When appellant was apprehended, a can of red paint, matching the color of the graffiti, was found just 10 feet from him. He had a red marker in his pocket, which though there was no evidence that it was used, matched the color of the spray paint.

E. Amount of damages

Appellant also claims that his conviction cannot stand because there is insufficient evidence that the vandalism caused damages of $400 or more. To establish the amount of the damages, the People introduced, through Valido, a four-page exhibit that Valido had assembled the day before his testimony. The first page was an invoice for cost incurred by the city for graffiti removal, the second and third pages were an e-mail to the contractor who performed the graffiti removal to clarify that the "actual address in question was the address that was abated." This e-mail was necessary because when Valido checked the data base to determine what the cost of the work was, the address of 1771 West Jefferson Boulevard, not 1775 Jefferson, came up. The final page was the graffiti removal cost sheet.

At trial, appellant objected to the admission of this four-page exhibit on the ground that it was hearsay and not within the business records exception because it was not prepared at or near the time of the events. He also objected that it violated his right to confrontation as set forth in *Crawford* because it was testimonial in nature, and he did not have the opportunity to cross-examine the people who inputted the information into the city's computer system, from where Valido retrieved the information for the-four page exhibit.

It is unnecessary for us to decide these issues. For even if we exclude from consideration the challenged documentary evidence, Valido's testimony was otherwise sufficient to support the finding that the damages were more than $400. Valido was the Graffiti Abatement Coordinator for the city. In that position, he handled records and invoices in the anti-graffiti request system data base. He testified without objection that, "[t]he $475 cost is the *flat rate fee* that is charge[d] for any private property. The graffiti could be an inch long. It could be 10 feet long. It will still be 475." (Italics added.) Valido also testified about "the costs that we incur due to graffiti removal from our crews." He was asked, "[PROSECUTOR]: Q. Without knowing whether there was clean up actually done on the property, if you saw damage to two roll down doors like these, could you estimate how much that would cost? [VALIDO]: A. Yes, I could. [PROSECUTOR]: Q. And how much would that cost? [VALIDO]: A. It would be $475 per roll down door because it is a private property. [PROSECUTOR]: Q. And is that always the cost that the City of L.A. charges for a clean up this time? [VALIDO]: A. Since July 2010, yes."

Appellant can be convicted of vandalism of $400 or more if he caused damages within the statutory amount. There is no statutory requirement that the damage must be repaired in order to establish that sum. Nor is there a requirement that the victim must make the repairs himself or find the cheapest manner of repairing the damage. Appellant caused the damage, and, so long as the repair cost is not unreasonable, cannot complain that the cheapest method of repairing the property be used. Valido established that any graffiti removal done by the city would be charged a minimum of $475. It is also of no consequence that the property that was defaced was not 1775 but rather 1771 Jefferson Boulevard, for appellant and the other suspect were seen vandalizing some property, and any vandalizing with spray paint would cost, according to Valido's testimony, at least $450 to remove. The damage done to any structure from appellant's vandalism supports his conviction.

II. Declaration of wobbler offense as felony or misdemeanor

A. Background

On November 10, 2009, appellant admitted the allegation in the prior petition that he had committed the crime of receiving stolen property (Pen. Code, § 496, subd. (a)), a wobbler (*Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 285), which had been alleged as a felony. Referee Cynthia Loo stated: "As to the [prior] petition . . . count 1 is true and that is a felony."

At the beginning of the adjudication hearing in connection with the present section 602 petition, Referee Loo said that appellant was charged with "felony vandalism." During post-testimony argument, defense counsel made a motion under Penal Code section 17, subdivision (b) to reduce the offense to a misdemeanor based in part on the amount of damage. Referee Loo failed to state on the record whether she was considering the offense a misdemeanor or a felony or to rule on the Penal Code section 17 motion. The referee did impose a maximum term of confinement of three years eight months, potentially consistent with the felony maximum term.[5] The minute order from that hearing had the box checked signifying that the offense was a felony.

B. Contention

Appellant contends that this matter must be remanded to the juvenile court for determination of whether the vandalism offense was a felony or a misdemeanor. He argues that the juvenile court failed to make that determination on the record.

The People contend that while the juvenile court failed to expressly state whether the offense was a felony or a misdemeanor, it implicitly did so. At the beginning of the adjudication hearing, the referee referred to the charged offense as "felony vandalism," she did not grant the appellant's Penal Code section 17, subdivision (b) motion to reduce

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5 See footnote 2, *ante.*

the offense to a misdemeanor, and the minute order of the adjudication hearing had the box denominated "felony" checked instead of the "misdemeanor" box.

We conclude that nothing in the record clearly indicates that the juvenile court was aware of its discretion to declare the offense either a felony or misdemeanor, therefore requiring remand for that purpose.

C. The requirement of section 702

A wobbler is any crime that may be punished as either a misdemeanor or a felony. (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1443, fn. 3.) When the amount of the damage is $400 or more, Penal Code section 594, subdivision (b) is a wobbler. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 906, fn. 14.) Section 702 provides in part: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony."

In *Manzy W.* the Supreme Court discussed the language in section 702 that the court "shall declare the offense to be a misdemeanor or felony." The *Manzy W.* court stated, "What is not at issue is what the juvenile court must do. The language of [Welfare and Institutions Code section 702] is unambiguous. It requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult. . . . [¶] The requirement is obligatory: '[Welfare and Institutions Code] section 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor.' [Citations.]" (*Manzy W., supra,* 14 Cal.4th at p. 1204.)

The significance of such a declaration is that it "'determines the maximum period of physical confinement . . . [and] may also have substantial ramifications in future criminal adjudications of the minor, including under Penal Code section 667, subdivision (d)(3)(A)—the 'Three Strikes' law.'" (*Manzy, supra,* 14 Cal.4th at pp. 1208–1209.) One purpose of the requirement of such a declaration is to " . . . ensur[e] that the juvenile court is aware of, and actually exercises, its discretion under [§] 702." (*Manzy W., supra,* at p. 1207.) "The key issue is whether the record as a whole establishes that the

juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Id.* at p. 1209.)

Neither the pleading, the minute order nor the setting of a felony-level maximum period of physical confinement can substitute for a declaration as to whether the offense is a misdemeanor or felony. (*In re Kenneth H.* (1983) 33 Cal.3d 616, 619–620 [pleading wobbler offense as a felony insufficient]; *Manzy*, *supra*, 14 Cal.4th at p. 1207 [setting a felon-length confinement term or filing section 602 petition alleging a wobbler offense as a felony insufficient]; *In re Eduardo D.* (2000) 81 Cal.App.4th 545, 549 [requirement of section 702 not met where minute order reflects that offense was a felony, when no oral declaration made in court], disapproved on other grounds in *In re Jesus O.* (2007) 40 Cal.4th 859, 867.)

Nonetheless, remand is not automatic. While *Manzy W.* appears to have concluded that the requirement can be satisfied only by stating at a hearing that the offense is a felony, it nonetheless stated that remand is not "'automatic' whenever the juvenile court fails to make a formal declaration under [§] 702." (*Manzy W.*, *supra*, 14 Cal.4th at p.1209.) The *Manzy W.* court continued: "Thus, speaking generally, the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such a case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error." (*Ibid.*)

On review of the entire record, we find no unambiguous indication that Referee Loo was aware of her discretion to declare the vandalism a felony or misdemeanor. Nearly two years before the adjudication in the current petition, Referee Loo stated after taking appellant's admission of the allegation that he received stolen property in the prior petition: "As to the petition filed on September 22, 2009, count 1 is true and that is a felony." While this statement can be construed as a declaration that the offense was a felony and that Referee Loo was aware of her discretion to declare it a felony or misdemeanor, it can also be viewed as either a mere statement that the petition to which Referee Loo referred alleged the offense as a felony or that Referee Loo incorrectly

believed that the offense could only be a felony. In any event, this statement was made years before the current disposition and was not made in the disposition before us.

As above stated, though the minute order of September 14, 2011, states that the offense is a felony, that is insufficient to constitute the required oral declaration (*In re Eduardo D., supra,* 81 Cal.App.4th at p. 549) as are the facts that the stated maximum term of confinement is not inconsistent with the vandalism being considered a felony (*Manzy W., supra,* 14 Cal.4th at p. 1207) and that it was alleged in the petition to be a felony (*ibid.*). The People point to Referee Loo's reference at the beginning of the adjudication hearing that appellant was charged with "felony vandalism." We view this statement as nothing more than a reference to the manner in which the offense was charged in the petition—as a felony, not a court determination of whether it should be a misdemeanor or a felony. This interpretation is supported by the fact that Referee Loo's statement was made *before* the referee had heard any evidence regarding the offense that would bear on whether it should be a misdemeanor or a felony.

The referee's failure to make the mandated finding is error requiring reversal. (See *In re Jeffery M.* (1980) 110 Cal.App.3d 983, 985.) Even if we were to consider this record to reflect a close question on whether the referee was aware of her discretion, we see little reason not to remand to the juvenile court to clarify any ambiguity in the record and clearly announce its intention.

III. Custody credits

A. Background

Appellant was first placed in custody on the prior petition on June 24, 2010, when he was placed in juvenile hall. On July 15, 2010, he was released to his parents on house arrest. On September 29, 2010, appellant was placed in suitable placement for six months with a maximum term of confinement of three years.

In connection with the current petition, appellant was taken into custody on August 5, 2011, where he remained until the dispositional hearing on September 14, 2011. The trial court awarded him 40 days of presentence credits at the conclusion of the dispositional hearing, reflecting this latter time period.

B. Contention

Appellant contends that he is entitled to an additional 22 days of custody credit for the time he was in juvenile hall in the prior petition. He argues that the maximum term of confinement of three years eight months is a combination of the maximum term of confinement in the current petition and in the prior petition and that "[a] minor is entitled to credit against his maximum term of confinement for the time spent in custody before the disposition hearing; this is so with respect to time spent in custody related to any matter that is used to calculate the maximum term of confinement." We agree with appellant.

C. Entitlement to precommitment credit

A juvenile's entitlement to predisposition custody credit is determined by section 726. (*In re Eric J.* (1979) 25 Cal.3d 522, 535 (*Eric J.*).) "If the court elects to aggregate the period of physical confinement on multiple counts or multiple petitions, including previously sustained petitions adjudging the minor a ward within Section 602, the 'maximum term of imprisonment' shall be the aggregate term of imprisonment specified in subdivision (a) of Section 1170.1 of the Penal Code . . . ." (§ 726, subd. (c).) Penal Code section 1170.1 states in part: "[w]hen any person is convicted . . . whether in the same proceeding or court or in different proceedings or courts . . . , the aggregate term of imprisonment for all . . . convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed . . . ." (Pen. Code, § 1170.1, subd. (a).) The California Supreme Court in *Eric J.* has concluded that when a juvenile court elects to aggregate a minor's period of physical confinement on multiple petitions pursuant to these foregoing statutory provisions, the court must also aggregate the predisposition custody credits attributable to those multiple petitions. (*Eric J.*, *supra*, at p. 536.)

While Referee Loo did not explicate how she determined the maximum term of confinement here, the three years six months assessment would appear to have been based on a maximum term of three years on either the vandalism allegation in the current petition or the receiving stolen property allegation in the prior petition (the upper term in

each) plus one-third the midterm of two years, or eight months, on the other allegation. As the maximum term was arrived at by setting an aggregate consecutive sentences, *Eric J.*, mandates that the custody credits be aggregated.

The People's reliance on *In re Ricky H.* (1981) 30 Cal.3d 176, is misplaced. In that case, unlike here, the juvenile court did not aggregate the minor's period of physical confinement for two wardship petitions.

People v. Bruner (1995) 9 Cal.4th 1178 (*Bruner*), also relied upon by the People, is inapposite. In *Bruner*, the defendant was taken into custody on a parole violation on May 25, 1991. In searching him, parole agents found a substantial quantity of rock cocaine for which he was cited but released on his own recognizance. However, he remained in custody under a parole hold pending disposition of his parole status. On July 25, 1991, his parole status was revoked. He received a prison term of 12 months with full credit for the time period between May 25, 1991, and July 25, 1991. An information was subsequently filed against appellant for the cocaine possession, to which he entered a plea and was sentenced to 16 months, concurrent by operation of law (§ 669, 2d par.) to the parole violation term. Appellant sought custody credit for the period he was in custody between May 25, 1991, and July 25, 1991, which was denied.

Unlike the matter before us, *Bruner* was not a juvenile case involving custody credit to be applied to the maximum term of confinement. Also, in *Bruner*, the defendant was seeking custody credit of time that he was in custody on the earlier parole violation matter and for which he had already received credit. Hence, appellant's request for credits for the custodial time amounted to a request for double time for the same period of incarceration. In the case before us, appellant was not seeking double credits but simply credit for all of the time that he was in custody on either of the petitions which went into calculating his consecutive maximum confinement time.

DISPOSITION

The order appealed from is modified to reflect 62 days of custody credit (the 40 days previously awarded plus an additional 22 days) and, pursuant to section 702 and *Manzy W.*, remanded to the juvenile court with directions to declare whether appellant's vandalism offense is a felony or a misdemeanor. The order is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ